STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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William F. Caton, Acting Secretary
Federal Communications Commission
1919 M. Street, NW
Washington, DC 20554

Re: In the Matter of Implementation of the Telecommunications Act of 1996:

and

Accounting Safeguards Under the Telecommunications Act of 1996 - CC Docket 96-150

Dear Secretary Caton:

Enclosed are an original and eleven copies of the initial comments of the New York State Department of Public Service in the above-referenced proceeding.

Respectfully submitted,

Penny Rubin
Managing Attorney

Enclosure
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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996:	)	CC Docket 96-150
	)	
Accounting Safeguards Under the Telecommunications Act of 1996	)	

COMMENTS OF THE NEW YORK STATE
DEPARTMENT OF PUBLIC SERVICE

INTRODUCTION AND SUMMARY

The New York State Department of Public Service (NYDPS) hereby submits its comments in response to the Federal Communications Commission's (Commission) Notice of Proposed Rulemaking (Notice) regarding implementation of the accounting safeguards of §§260 and 271 through 276 of the Telecommunications Act of 1996 (the 1996 Act).

The NYDPS urges the Commission to refrain from attempting to expand its authority over interstate telecommunications, to intrastate telecommunications. The Telecommunications Act of 1996 significantly advanced the potential for telecommunications competition; it did not, however, fundamentally alter the dual jurisdictional approach to regulation, except in very limited circumstances. The Commission's tentative conclusion that the 1996 Act gives it authority over the accounting safeguards related to various intrastate telecommunications service is incorrect as a matter of law. We agree, however, with the tentative conclusion that if the Commission does have the authority, which we do not believe, it should not exercise that authority.

As a policy matter, NYDPS generally supports the accounting safeguards proposed in the Notice as applied to interstate services. We agree that subscribers and competitors should be protected from the consequences of potential cost allocation abuses and discriminatory practices during the transition to a fully competitive telecommunications market. The NYDPS makes several suggestions to strengthen the Commission's rules which at the same time ensure telecommunications carriers sufficient flexibility to meet their corporate objectives.

I. SCOPE OF THE COMMISSION'S AUTHORITY

The Notice sets forth the Commission's tentative view regarding its jurisdiction over the accounting safeguards provisions of §§260 and 271 through 276 of the Telecommunication Act of 1996. These Sections address Bell Operating Company (BOC), and in some instances, incumbent local exchange carrier, provision of certain interLATA telecommunications and information, alarm monitoring, electronic publishing and payphone services that the BOCs may be permitted to provide on an integrated basis. The Notice seeks comment on whether the Commission's Authority extends to accounting safeguards for BOC provision of any of these services provided on an intrastate basis, (NPRM at ¶¶34, 43, 55, 61, 100, and 116). The Notice also seeks comment on whether under Louisiana Public Service Commission v. FCC, 476 U.S. 355, 375 n. 4 (1986) ("Louisiana PSC") it has sufficient authority to preempt, even if the 1996 Telecommunications Act does not grant it that authority, and whether it should exercise its authority, (¶¶36, 50, 56, 116).[1]

A. The Tentative Conclusion That the Commission's Authority Under Sections 260, and 271-276 Supersedes State Authority Under These Sections is Incorrect

As the NYDPS has stated on numerous occasions, the Commission's authority to preempt the states over intrastate charges, classifications, practices, services...under §152(b) of 1934 Communications Act must be narrowly construed. The United States Supreme Court has consistently articulated a stringent legal standard for determining whether Congress intended preemption, and basic rules of statutory construction provide that, where possible, provisions of a statute should be read so as not to create a conflict, Washington Market Co., v. Hoffman, 101 U.S. 112 (1879). For the reasons discussed below, the Commission's conclusion that its authority to establish various intrastate accounting safeguards under §§260, and 271-276 supersedes state authority is legally incorrect.

First, Congress did not alter jurisdictional responsibilities regarding the provision of intrastate interLATA telecommunications and information services (including

[1] It also seeks comment on its authority over incumbent local exchange carrier provision of these services on an intrastate basis. These comments apply, as well, to intrastate accounting safeguards for non-BOC incumbents, to the extent these provisions apply to them.

telemessaging services) under the 1996 Act. In our comments on non-accounting safeguards under §§271 and 272, the NYDPS established that the plain language of the 1996 Act and the explicit limitation on the Commission's authority under §152(b) of Communications Act of 1934 prohibits the Commission from concluding that it has the authority to preempt state mandated non-structural safeguards.[1] The Commission, therefore, has no more authority to conclude that it has authority over intrastate accounting requirements than it does over non-accounting safeguards.

As we stated in the Non-Accounting Safeguards NPRM, the elimination of the MFJ, does not, limit state authority over intrastate interLATA telecommunications. The states have a long history of overseeing the intrastate operations of companies that were not prohibited, under the MFJ, from providing these services. The dual state/federal regulatory system that applied to intrastate and interstate services has a long tradition, beginning much earlier than the MFJ. In enacting the 1996 Act, Congress did not see fit to eliminate state authority over intrastate communications, nor did it distinguish between state authority over BOC intrastate interLATA services and independent company intrastate interLATA service.

[1] Comments of the New York State Department of Public Service, Implementation of Non-Accounting Safeguards of §§271 and 272 of the Communications Act of 1934, CC Docket 96-149, filed August 14, 1996 (Non-Accounting Safeguards NPRM).

This notice, as did the Non-Accounting Safeguards NPRM, concludes that because Congress enacted §§271 and 272 after §152(b), Congress intended §§271 and 272 to take precedence over any contrary implications in §152(b), (¶48). According to these NPRM's, "there are instances where Congress indisputably gave the Commission intrastate jurisdiction without amending §2(b)." Although this is a true statement, the fact that Congress deemed it necessary to identify specific areas in which it was conferring authority over intrastate matters to the Commission (e.g., intrastate payphone service provider compensation in §276(b)) indicates Congress' recognition of the continued effect of 152(b). Thus, in the absence of an express indication of the contrary, §152(b) continues to "fence[] off from FCC reach or regulation intrastate matters, Louisiana Public Service Commission v. FCC, 476 U.S. 355, 370 (1986).

In addition, as we have said, §601(c)(1) of the Act reflects Congress' intent to identify the parameters of the Commission's reach by providing that:

> This Act and the Amendments made by this Act shall not be construed to modify, impair, or supersede federal, state, or local law unless expressly so provided in such Act or amendments.

Thus, absent an express directive to establish rules applicable to intrastate interLATA services, the Commission lacks the authority to do so.

The Notice also seems to suggest that because §§251 and 252 of the Act, which establish requirements for competitive entry into the local exchange market, apply to both interstate and intrastate aspects of interconnection, and since the safeguards called for §§271 and 272 constitute part of the requirement for BOC entry into the interLATA marketplace, and since they were enacted simultaneously, then it follows that §§271 and 272 also apply to all interLATA services, (¶46). The fact that all of these sections are associated with a entry into the interLATA marketplace does not confer jurisdiction on the Commission over services that are intrastate in nature, unless the Act explicitly so states. The plain language of §271 is silent on the jurisdictional division of responsibilities and therefore, §§601 and 152(b) are controlling.

Moreover, there is no explicit reference in the Act that limits the states from exercising their jurisdiction, under state law, over electronic publishing, manufacturing and payphones. In fact, under §261 (effect on other requirements), states are specifically permitted to impose and enforce their own regulations provided they meet the requirements of the Act. Moreover, §276(c) makes clear that state regulations over payphones should not be preempted, unless they are inconsistent with the Commission's regulations. Most important are §601(c)(1), and §152(b) of the 1934 Act. Taken together these sections support the conclusion that Congress did not intend that the FCC reach extend to intrastate telecommunications, as proposed in this Notice.

B. The Louisiana PSC Decision Does Not Provide a Basis for Preemption

In the event that the 1996 Telecommunications Act does not provide a basis for preemption of state accounting requirements, the Notice seeks comment on whether footnote 4 of Louisiana PSC provides sufficient grounds for such preemption. As New York has stated many times, the Supreme Court in Louisiana PSC made perfectly clear that jurisdictional tensions may arise as a result of the fact that interstate and intrastate services are provided by a single integrated systems but that is not sufficient to justify preemption, Louisiana PSC at 355. The Court rejected the Commission's position that it could preempt state regulation of depreciation rates because it interfered with its goals in accelerating those rates.

Footnote 4 distinguishes Commission preemption of depreciation rates from its preemption of a state prohibition on customers using their own equipment (CPE) to access the network. In one instance the Court found it impossible for the two sets of regulations to co-exist (CPE) and in the other is did not (depreciation).[1] There is, however, no doubt that two sets of accounting regulations can coexist.

The notice itself tentatively concludes that the Commission is inclined not to exercise its authority and instead retain "its prior policy of not preempting states from using their own cost allocation procedures for intrastate purposes",

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[1] North Carolina Utilities Commission v. FCC, 537 F.2d 787 (4th Circ.), Cert denied, 429 U.S. 1027 (1976).

(NPRM ¶¶36, 50, 56, 116). Just as the Commission has concluded that state and federal cost allocation practices have co-existed in the past, its conclusion not to depart from that policy is correct as a matter of law.

Moreover, to the extent that the BOCs will be providing new services (interLATA, manufacturing), any preemption decision now is premature at best. The court in California III determined that "'[t]he FCC has the burden...of showing with some specificity that [state regulation]...would negate the federal policy...'".[1] The Commission cannot meet this burden in the instant proceeding since all it can rely on is speculation.

II. SAFEGUARDS FOR SEPARATED OPERATIONS

The NYDPS generally agrees with the Commission's conclusion that existing accounting safeguards under Parts 32 and 64, with some modification, will meet the statutory requirements of §§260 and 271 through 276 of the 1996 Act, (¶11). In the following sections, the NYDPS makes several suggestions to strengthen the Commission's rules and at the same time ensure telecommunications carriers sufficient flexibility to meet their corporate objectives.

A. Accounting Requirements of Sections 272(b)(2) and (c)(2)

The Commission invites comment on maintenance of "books, records and accounts", (¶68). Affiliate transactions

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[1] People of State of California v. FCC, 905 F.2d 1217, 1243 (9th Cir. 1990) citing National Association of Regulatory Commissioners v. FCC, 880 F.2d 422, 430 (D.C. Cir. 1989).

raise the potential for anticompetitive behavior and ratepayer harm during the transition from a monopoly to a fully competitive market. The New York Commission has had a long history of dealing with affiliate relationships in a monopoly context and therefore recommends that, during the transition period, regulated companies and their affiliates that engage in non-regulated activity without effectively establishing clear and distinct structural separation must be required to open their books and records to regulators with respect to such transactions. These requirements will guard against cross subsidization and further the effective development of a competitive market.

B. Fair Market Value

The Notice seeks comment on providing the BOCs greater flexibility to determine fair market value when engaging in affiliate transactions, (¶83). We generally support this idea and suggest that in furthering the objective of arm's length treatment, the BOC or §272 affiliate should be required to apply the same procurement procedures to its affiliate transaction as it does when it purchases goods and services from a non-affiliate.

C. Sec 272 Audit Requirements

The Act mandates that companies required to maintain a separate affiliate under §272 shall obtain and pay for a federal/state audit every 2 years conducted by an independent auditor...(§272(d)). The Notice, however, does not address the selection of the independent auditor, (¶¶92 & 93). The selection of the auditor should be decided jointly by the BOC, the Commission, and the State affected by the audit. With this approach the audit will reflect the interests of all three parties. Also, to ensure the effectiveness of the audit, the federal/state regulators, if they so desire, should have access to the auditor's workplan, correspondence with the BOC, and be able to attend meetings between the BOC and auditor where audit procedures and findings are discussed.

III. RELEVANCE OF ACCOUNTING SAFEGUARDS UNDER PRICE CAPS

The Commission seeks comment on whether the permanent elimination of sharing obligations for price cap carriers would eliminate the need for Part 64 cost allocations and how the relationship of the its cost allocation rules to price cap local exchange carriers influence the outcome of this proceeding, (¶124). It also seeks comment on the relationship between the Act's prohibition against using non-competitive revenues to subsidize competitive services and the elimination of Part 64 cost allocations, (§§124, 125).

Until the telecommunications market is effectively competitive and full deregulation takes place, there will continue to be a need for the Part 64, cost allocation requirements. For example, the pricing requirements under §252(d) of the 1996 Act require the use of cost information to develop access, interconnection and resale rates. Absent a mechanism for allocating cost, this mandate could not be met.

Furthermore, if proper estimates of the universal service subsidy are to be made to fulfill the Congressional mandate, accurate regulated cost information remains necessary. Moreover, the §254(k) prohibition against cross-subsidization can only be enforced if the mechanisms are in place to allocate those costs. Finally, as long as price caps are updated and revised costs will need to be allocated between regulated and unregulated activities. Once there is effective competition and deregulation, however, these rules will be obsolete.

CONCLUSION

For all the reasons stated above, we recommend that the changes proposed above be adopted.

Respectfully submitted,

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Dated: August 23, 1996

CC Docket No. 96-150

In the Matter of

Implementation of the Telecommunications Act of 1996:

Accounting Safeguards Under the Telecommunications Act of 1996

Comments of New York State Department of Public Service

CERTIFICATE OF SERVICE

I, Penny Rubin, hereby certify that an original and eleven copies of initial comments in the above-captioned proceeding were sent via Airborne Express to Mr. Caton, and by first class United States mail, postage paid, to all parties on the attached service list.

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